



SUPREME COURT OF KENTUCKY
NO. 15-SC-000173-D
COURT OF APPEALS FILE NOS. 2013-CA-000891,
2013-CA-000930, 2013-CA-001642
JEFFERSON CIRCUIT COURT ACTION NO. 11-CI-503339

JUDE MARIE WEBER (f/k/a LAMBE)

APPELLANT

V. DISCRETIONARY REVIEW FROM COURT OF APPEALS
FILE NOS. 2013-CA-000891, 2013-CA-000930, 2013-CA-001642

THOMAS FRANCIS LAMBE

APPELLEE

REPLY BRIEF FOR THE APPELLANT, JUDE MARIE WEBER

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CERTIFICATE OF SERVICE

It is hereby certified that on the 29th day of June 2016, a copy hereof was served by mail upon Eugene L. Mosley, M. Thomas Underwood, Mosley, Sauer, Townes & Watkins PLLC, One Riverfront Plaza, 401 W. Main St., Louisville, KY 40202, Counsel for Appellee, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Judge, Jefferson Circuit Court Family Division Nine (9), 700 W. Jefferson St., Louisville, KY 40202. It is further certified that ten (10) copies of this Brief were sent by FedEx Overnight on this the 29th day of June 2016, in accordance with CR 76.12(3)(a) to the Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601.

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STATEMENT OF POINTS AND AUTHORITIES

<u>STATEMENT OF POINTS AND AUTHORITIES</u>	i
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<u>ARGUMENT</u>	1
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I. The Cases Cited by Tom from Other States are Not Binding on the Courts of this State and can be Distinguished from the Case at Hand...... 1

KRS 403.200..... 1, passim

Shawnee Telecom Res., Inc. v. Brown, 354 S.W.3d 542 (Ky. 2011). 1

Robinson v. Robinson, 707 S.E.2d 785 (N.C. App. 2011)..... 2

Lin v. Lin, 37 So.3d 941 (Fla. App. 2 Dist. 2010)..... 2

Loughlin v. Loughlin, 889 A.2d 902 (Conn. App. 2006)..... 2

Saia v. Saia, 788 N.E.2d 577 (Mass. App. Ct. 2003) 2

Lambert v. Lambert, 395 S.E.2d 207 (Va. App. 1990).....2-3

N.C. Gen Stat.50-16.3A(b)(7)..... 2

II. Missouri Law on Support Obligations is Different than Kentucky Law on Support Obligations, as is Evidenced by the States' Varying Child Support Statutes...... 3

Cohen v. Cohen, 73 S.W.3d 39 (Mo. App. W.D. 2002)4-5

V.A.M.S. 452.340 5

KRS 403.212..... 5

KRS 403.211(3) 5

III. The Trial Court Made Specific Findings Regarding the Duration of Maintenance. 6

IV. The Trial Court Abused its Discretion in Not Awarding Jude all of the Attorney's Fees she Requested. 7

KRS 403.220..... 7,8

<i>Gentry v. Gentry</i> , 798 S.W.2d 928 (Ky. 1990)	8
<i>Miller v. McGinty</i> , 234 S.W.3d 371 (Ky. App. 2007).	8
<i>Atkisson v. Atkisson</i> , 298 S.W.3d 858 (Ky. App. 2009)	8
<u>CONCLUSION</u>	9

ARGUMENT

The Appellant is Jude Marie Weber (formerly Lambe) (“Jude”), and the Appellee is Thomas Francis Lambe (“Tom”).

I. The Cases Cited by Tom from Other States are Not Binding on the Courts of this State and can be Distinguished from the Case at Hand.

The issue of whether a court should include expenses related to dependent children in determining a spouse’s reasonable needs in relation to a maintenance award under KRS 403.200 is an issue of first impression in Kentucky. Tom has not cited any Kentucky cases to support his argument on this issue, namely that a trial court should not be permitted to include expenses attributable to the minor children in the living expenses of a spouse seeking maintenance under KRS 403.200.

Each of the cases cited by Tom in his brief is from another state. Thus, even if the cases Tom has cited were on point, they are merely persuasive authority and are not binding on this Court nor any other court in Kentucky. Further, there is no reason to look to cases from other jurisdictions on this issue, as the Kentucky statute on maintenance is unambiguous, as described below and in Jude’s brief. “Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute’s legislative history; the canons of construction; or, especially in the case of model or uniform statutes interpretations by other courts.” *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

Tom cites a list of cases from other jurisdictions that allegedly support his argument in this case, but provides no description of any of the cases which he cites. Based on a cursory review of the cases, coupled with the fact that Tom failed to present any arguments to support application of these cases, their review by this Court is unnecessary. The cases

cited by Tom in his brief are: *Robinson v. Robinson*, 707 S.E.2d 785 (N.C. App. 2011); *Lin v. Lin*, 37 So.3d 941 (Fla. App. 2 Dist. 2010); *Lovejoy v. Lovejoy*, 782 N.W.2d 669, 2010 SD 39 (S.D. 2010); *Loughlin v. Loughlin*, 889 A.2d 902, 93 Conn. App. 618 (Conn. App. 2006); *Saia v. Saia*, 788 N.E.2d 577, 58 Mass. App. Ct. 135 (Mass. App. Ct. 2003); and *Lambert v. Lambert*, 395 S.E.2d 207, 10 Va. App. 623 (Va. App. 1990).

In *Robinson*, the court noted that the legislator in North Carolina explicitly altered the language of the relevant statute to state: “the extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as a custodian of a minor child” is a factor to be considered when setting alimony. 708 S.E.2d at 794 (quoting N.C. Gen Stat.50-16.3A(b)(7)) (citations and emphasis omitted). The court held that the lower court erred in including expenses for the parties’ *emancipated* child in the wife’s expenses for purposes of calculating alimony. *Id.* Neither of these points supports Tom’s position.

Similarly, the *Loughlin* court held “the economic impact of an alimony recipient of caring for a minor child may be a proper consideration for the court when settling the term of alimony.” 889 A.2d at 913 (citations omitted). Again, *Loughlin* dealt with a situation where a spouse seeking maintenance was including expenses of a child over the age of majority, which is not the case here with Jude. *Saia* also was a case involving an error regarding the inclusion of expenses for children over age eighteen (18) in the computation of maintenance. 788 N.E.2d at 578.

Finally, the court in *Lambert* merely held that it was error for the lower court to consider the fact that the court had ordered an award of child support to a spouse when determining that the spouse did not have a need for alimony. 395 S.E.2d at 210. That court

did not address the calculation of maintenance, nor the inclusion, or non-inclusion, of the children's expenses with respect to maintenance. *Id.*

II. Missouri Law on Support Obligations is Different than Kentucky Law on Support Obligations, as is Evidenced by the States' Varying Child Support Statutes.

Tom argues that Missouri law is akin to Kentucky law on the issue at hand because the maintenance statutes of each state are substantially similar. However, Tom fails to address the differences in the states' respective child support statutes. Missouri law's fundamental difference in its calculation of child support significantly impacts maintenance determinations in that state in a way that is not proper for Kentucky courts to determine maintenance, due to Kentucky's unique child support statute and guidelines.

As duly noted by the trial court, Kentucky's child support statutes reflect "the duty of each parent to provide for the children in proportion to their incomes." To rule otherwise would unfairly penalize the caretakers of children in maintenance cases. The obligations assigned to respective parties under the child support statutes deserve equal consideration when subsequently contemplating the calculation of maintenance. KRS 403.200 specifically requires that a court consider "[t]he financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, *including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian.*" (emphasis added). This emphasized phrase directly refers to the custodian's obligation to provide for the needs of the children.

KRS 403.200 cannot be interpreted to require a court to consider money received by the custodian for child support, while at the same time ignoring that custodian's

expenses incurred due to the very nature of being a custodian. A child support calculation that allocates children's expenses between the parents proportionately based upon income, whether performed under the guidelines or deviating therefrom, does not yield a single sum that must be paid from one (1) parent to the other. Instead, it yields two (2) obligations, and each parent is responsible for his or her proportionate share, although there is only the payment from the noncustodial parent, as the parent with primary residence pays the children's expenses directly. It follows, then, that, to the extent that Jude is responsible for a portion of the children's expenses, the children's expenses must be considered in determining the amount of maintenance awarded to her.

If, in considering "[t]he ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance" a court must consider one party's child support obligation, equity demands that it must also consider the children's expenses incurred by the spouse receiving maintenance. KRS 403.200. Limiting a court's ability to consider child-related expenses to only those expenses incurred by the party paying maintenance, and not the party seeking maintenance, in a determination under KRS 403.200 would inhibit the court's ability to enter orders that actually provide for the reasonable expenses of the party receiving maintenance, including that party's expenses incurred in raising and providing for his or her children. It is well-known that the guideline amount of child support in Kentucky does not cover all expenses incurred in raising a child. In fact, in most if not all cases, the cost of raising children greatly exceeds the amount of child support paid by the noncustodial parent.

The Court of Appeals adopted the reasoning of *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. App. W.D. 2002) in its November 14, 2014 Opinion. However, Missouri law's standard

for the calculation of child support differs significantly from that delineated by the Kentucky Child Support Guidelines. *See* V.A.M.S. 452.340. In *Cohen*, the court considered the appellant's claim that it was error to include in a party's reasonable expenses for purposes of calculating maintenance, "child expenses *that were also included in the court's calculation of child support.*" 73 S.W.3d at 50 (emphasis added). Unlike Missouri, where *Cohen* was decided, Kentucky courts normally do not take into consideration monthly expenses for the purposes of calculating child support. *See* V.A.M.S. 452.340. Kentucky courts also do not normally take into consideration the extraordinary child-rearing costs and children's living expenses in the calculation of child-support, whereas Missouri courts include these expenses. *Id.* Instead, Kentucky law heavily relies on the Kentucky Child Support Guidelines of KRS 403.212, which are primarily based on the gross monthly income of the parties. While KRS 403.211(3) does provide exceptions to the use of guideline awards, these factors are not the standard basis for the calculation of child support as they are in Missouri.

In Missouri, the children's expenses are explicitly covered by child support obligations; whereas in Kentucky, if the Missouri rule disallowing the consideration of children's expenses in a custodial parent's maintenance award is applied, the children's expenses will not be covered by either a child support or maintenance award. Especially in cases like this one, where it has been found that the custodial parent cannot work outside the home and her sole source of income is her maintenance award, such a rule in this state effectively eliminates that portion of the children's expenses apportioned to the custodial parent.

III. The Trial Court Made Specific Findings Regarding the Duration of Maintenance.

Tom's argument that the trial court did not make specific findings to support the duration portion of the maintenance award is inaccurate. Obvious consideration was given to the issue of maintenance, as the trial court made findings concerning Tom's age, his work history, his high level position, and the fact that he had been earning a considerable salary with his employer for a number of years. Similarly, specific findings were made regarding Jude's inability to support herself through the marital property apportioned to her, Jude's lack of work experience, and her inability to enter the workforce due to this lack of experience as well as her need to care for Margaret. The findings set out by the trial court are more thoroughly set out in Jude's brief. In sum, the trial court was provided with sufficient evidence and gave sufficient consideration to the relevant factors in finding that Jude was entitled to an award of maintenance for a duration of much longer than nine (9) years.

Both parties' expert witnesses found that Jude was unable to work, and as Jude had no course of independent income, all of her expenses, as well as the children's expenses were paid out of maintenance and child support received from Tom. Jude's vocational expert, Linda Jones, testified that Jude had no "past relevant work history" as defined by the Social Security Administration. VR, 11/15/12, 11:17:53-11:17:59. Though Tom's vocational expert, Robert Tiell, disagreed about Jude's earning potential, both experts agreed that Jude was presently unable to work because of her care for the medical needs of Margaret. *Id.* at 11:18:03-11:18:34.

Further, the trial court made specific findings on Jude's living expenses, and her expenses as found by the trial court are supported by the evidence in the record herein.

Helen Cohen, the parties' joint expert, calculated Jude's post-divorce living expenses at \$10,887, assuming a fifteen (15) year home mortgage and a ten percent (10%) down payment on her car. [R. 463]; RTE 9. Jude also submitted a second list of post-divorce living expenses at trial of \$9,932 assuming a thirty (30) year mortgage and a new car with credit for the value of Jude's current vehicle. *Id.* Ms. Cohen's comprehensive and exhaustive analysis was based upon the parties' actual expenses drawn from their bank and credit card accounts over a period of three years: 2009, 2010, and 2011. RTE 10.

Moreover, Tom has misstated his income in his brief. Tom refers to his *net income*, rather than his gross income, which is the amount that is clearly relevant under KRS 403.200. Ms. Cohen projected that Tom's income for the year 2012 would be \$285,496.51 (exclusive of certain pre-tax benefits). RTE 38. This figure reflects the fact that Tom has historically received a bonus of approximately \$30,000 and a grant of stock options *for every year since 2004*. *Id.* The trial court allowed supplementation of the record with the parties' 2012 tax return, which was not available at the time of trial, but showed that Tom's 2012 gross income was very close to Ms. Cohen's projections, \$283,092. [R. 623-659]. Tom's assertion that his income was just \$126,058.03 is erroneous based on the substantial evidence in the record.

IV. The Trial Court Abused its Discretion in Not Awarding Jude all of the Attorney's Fees she Requested.

Tom has provided no grounds as to why Jude should not have received the full amount of attorney's fees she requested at the time of trial. The trial court abused its discretion in failing to award Jude sufficient attorney's fees, providing Jude with less than twenty percent (20%) of the attorney's fees she incurred during litigation. KRS 403.220 provides, in part: "The court from time to time after considering the financial resources of

both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees." Pursuant to KRS 403.220, no more than a finding of disparity in the financial resources of the parties is required to assess costs against the wealthier party. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). As Tom points out, the trial court is obligated to consider the financial resources of both parties before entering an award of attorney's fees. *Miller v. McGinty*, 234 S.W.3d 371 (Ky. App. 2007). In doing such a comparison in this case, it is abundantly clear that there is a significant disparity in Tom's financial resources compared to Jude's.

With respect to a finding of financial imbalance, the opinion in *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009), is on point with this case. Tom has provided no argument as to why *Atkisson* should be distinguished from this case. In *Atkisson*, the Court of Appeals affirmed an award of attorney's fees to the wife over the husband's claim of error, who argued that the fee award was unwarranted based upon the amount of marital and non-marital property assigned to the wife. *Id.* at 864-865. It noted that, while the wife was awarded "a substantial amount of liquid marital property," the husband retained "a substantially higher earning capacity" and he received significant property as well. *Id.* at 865. Additionally, it recognized that the award of fees was "only about half" of the entire fee amount claimed by the wife. *Id.* The court refused to find an abuse of discretion under those circumstances.

Like the husband in *Atkisson*, Tom has a much higher earning capacity than Jude, whom the court found was unable to work. There is a significant disparity in the parties' financial resources. As a result, Tom is clearly in a position of financial superiority. In

order to “level the playing field,” the trial court should have awarded Jude a greater percentage of the attorney’s fees she incurred in this case, and to refuse to do so constituted an abuse of discretion.

CONCLUSION

In conclusion, Jude requests that this Court reverse the November 14, 2014 Opinion and Order of the Court of Appeals, in part, to hold that:

- 1) the family court did not err in including Jude’s proportionate share of the children’s expenses in her reasonable monthly living expenses for the purpose of computing maintenance;
- 2) Jude is entitled to an award of open-ended maintenance;
- 3) Tom’s current income is \$285,496.51, rather than his prior year’s income of \$225,072; and
- 4) the trial court abused its discretion in refusing to award Jude all or a greater portion of her attorney’s fees.

Jude further requests that this Court find that this case should be remanded to the trial court with instructions consistent with these holdings.

Respectfully submitted,


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